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A Public Advocate for Privacy

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Since 1979, the United States Government has made at least 35,651 applications to the **Foreign Intelligence Surveillance Court (FISC)** for authority to conduct electronic surveillance and physical searches of individuals.[1] Of those requests, only 12 have been denied; 532 requests have been formally modified. According to one judge on the FISC, a substantially higher number have been modified as a result of informal communications between the government and the FISC staff.[2] The nature of those modifications, however, remains confidential, as does the entire process for considering such requests. Consequently, it is simply not possible to determine whether a larger number of requests should have been denied or further modified.

Since our country's founding, the rule of law and our judicial system that helped establish it have depended on an adversarial system to make sure that the appropriate balance is struck between competing interests—in this case between individual privacy and national security. Our nation's legitimate national security needs require that individuals who are under surveillance not know that the surveillance is being conducted. But that imperative does not dictate that we dispense with the time-tested value of the adversarial system in the FISC.

To that end, several legislative proposals have recently been put forth to create a Public Advocate for Privacy who would defend, in the FISC, the legal interests of individuals subject to surveillance requests. The Public Advocate would have all necessary security clearances, and his or her work would remain unknown to the persons potentially under surveillance. Under the more robust proposals, the Public Advocate would be permitted to monitor the docket of the FISC and affirmatively litigate in both the FISC and on appeal to help vindicate legitimate privacy interests under the Fourth Amendment and other laws.

The bill recently passed by the House of Representatives has moved away from a Public Advocate office that would challenge individual surveillance requests and adopted instead a less robust "amicus" model consisting of a panel of lawyers that would intervene on legal questions only when (and to the extent) requested by the FISC itself. As of this writing, however, the bill pending in the Senate continues to reflect the more robust version of the Public Advocate.

In the course of the legislative process, questions have been raised regarding the constitutionality of such a Public Advocate. In particular, the Congressional Research Service (CRS) has produced a thoughtful paper identifying some important issues concerning, among other items, the standing of the Public Advocate to litigate such matters.

To further the public discussion of this important issue, AOL, Inc. asked for an analysis of the constitutional issues raised by the CRS. A paper is available here. It concludes that there is no insurmountable constitutional infirmity to a robust Public Advocate that can litigate on behalf of individuals subject to surveillance requests.

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[1] The statistics referenced in this article are drawn from the Electronic Privacy Information Center. *See Foreign Intelligence Surveillance Act Court Orders 1979-2014*, Elec. Privacy Info. Ctr. (last updated May 1, 2014), http://epic.org/privacy/wiretap/stats/fisa_stats.html.

[2] *See* Letter from Judge Walton of the FISC to Senator Grassley (Oct. 11, 2013).

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